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VIA E-MAIL AND U.S. MAIL

Ms. Jennifer J. Johnson
Secretary of the Board
Board of Governors of the
Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551

Re: Proposed Disclosure Rules Under Consumer Protection Regulations
(Docket Nos. R-1167, R-1168, R-1169, R-1170 and R-1171)

Ladies and Gentlemen:

We appreciate the opportunity to submit comments on the Board's proposed rules to provide a more precise definition of "clear and conspicuous" under Regulation B (Equal Credit Opportunity) (12 C.F.R. Part 202), Regulation E (Electronic Fund Transfers) (12 C.F.R. Part 205), Regulation M (Consumer Leasing) (12 C.F.R. Part 213), Regulation Z (Truth in Lending) (12 C.F.R. Part 226) and Regulation DD (Truth in Savings) (12 C.F.R. Part 230) (the "Consumer Protection Regulations").[1] As a financial services law firm, Schwartz & Ballen LLP provides advice to financial institutions concerning disclosures in connection with transactions subject to the Consumer Protection Regulations. Because our clients will be affected by the Board's proposed rules, we believe it is appropriate to inform the Board of the effects the proposed rules may have upon financial institutions.

The Board proposes to amend the Consumer Protection Regulations to include a definition of "clear and conspicuous" that would be consistent with that of Regulation P (Privacy of Consumer Financial Information) (12 C.F.R. Part 216), and to add examples of how affected parties may meet the clear and conspicuous standard. The stated purpose of the proposed rules is to ensure that the disclosures required under the Consumer Protection Regulations convey "noticeable and understandable information that is

[1] 68 *Fed. Reg.* 68,786-68,802 (Dec. 10, 2003).

required by law in connection with obtaining consumer financial products and services." In addition, the proposal attempts to facilitate compliance by improving consistency among the regulations.[2]

SUMMARY

We do not believe that the proposed rules, if adopted, will accomplish the Board's objectives. Moreover, the proposed rules, if adopted, will impose significant additional costs on financial institutions that far exceed any marginal benefit that may be achieved. Accordingly, we believe that the Board should not adopt the proposed rules.

The proposed "clear and conspicuous" standard should not be modeled after Regulation P, which merely provides for a standardized *notice* of an institution's privacy policy. The proposed rules would affect *disclosure* requirements of the Consumer Protection Regulations. The variety of disclosures that are regulated under the Consumer Protection Regulations require flexibility in the clear and conspicuous standard to address the multitude of disclosures that are required under those regulations. The proposed rules fail to acknowledge that, unlike the notice requirement under Regulation P, disclosures in and among the Consumer Protection Regulations vary widely in form and content. Accordingly, a "one-size fits all" approach is uncalled for and inappropriate.

Moreover, the proposed rules conflict with at least two other ongoing Board rulemakings. In December, the Board and the other agencies announced an advanced notice of proposed rulemaking that requested comment on possible amendments to Regulation P and the other agencies' privacy rules under the Gramm-Leach-Bliley Act with respect to alternative types of privacy notices.[3] In addition, just a few weeks ago, the Board and the other agencies requested public comment to identify outdated, unnecessary or unduly burdensome regulatory requirements.[4] Both proposals are likely to elicit comments that address the requirements in Regulation P and the Consumer Protection Regulations. To avoid prejudicing these pending rulemakings, it would seem desirable for the Board to defer action on this proposal until those related rulemakings are completed. Deferring action on the proposed rules would also avoid the possibility that financial institutions would have to incur additional expenses to do their disclosures in the event the other rulemakings result in meaningful changes to the Consumer Protection Regulations.

Further, the requirement that in order to be "clear and conspicuous" the disclosure must be "designed to call attention to the nature and significance of the information in the disclosure" is objectionable because it is unduly burdensome. This requirement would add three new elements to the "clear and conspicuous" standard: (1) the disclosure would have to be specifically and affirmatively *designed* to call attention to itself;

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[2] 68 *Fed. Reg.* 68,786-7 (December 10, 2003).
[3] 68 *Fed. Reg.* 75,164 (December 30, 2003).
[4] 69 *Fed. Reg.* 2852 (January 21, 2004).

(2) the disclosure would have to call attention to the *nature* of the information in the disclosure, as opposed to the actual disclosure; and (3) the disclosure would have to draw attention to the *significance* of the information provided in the disclosure, as opposed to the actual disclosure itself. The examples in the proposed rules do not indicate how each element of this requirement may be met, and thus leave financial institutions exposed to potential liability arising from a possible failure to comply with an apparent ambiguous standard.

Finally, as drafted, the proposed rules impose significant additional costs on financial institutions to ensure initial and ongoing compliance with the standards set forth in the proposed rules without providing significant benefits to consumers. The resulting costs ultimately will be borne by customers of financial institutions.

We believe the model forms that are currently set forth in the Consumer Protection Regulations meet the clear and conspicuous standard without reference to Regulation P's definition of the term. The model forms take into account the nature and significance of the information in the disclosure because they were promulgated under regulations addressing various transactions regulated under the Consumer Protection Regulations. Accordingly, there is no need for the Board to apply the standard currently contained in Regulation P to the Consumer Protection Regulations.

IT IS INAPPROPRIATE FOR THE DEFINITION OF "CLEAR AND CONSPICUOUS" APPLICABLE TO REGULATION P PRIVACY NOTICES TO BE THE STANDARD FOR DISCLOSURES UNDER THE CONSUMER PROTECTION REGULATIONS.

Regulation P defines "clear and conspicuous" disclosure to mean "reasonably understandable and designed to call attention to the nature and significance of the information."[5] The Board proposes to apply the same standard to the Consumer Protection Regulations and to add examples of what constitutes "clear and conspicuous" from the commentary of Regulation P.

The use of Regulation P's definition of "clear and conspicuous" for the Consumer Protection Regulations is inappropriate because the Consumer Protection Regulations address *disclosures* relating to a variety of transactions. Regulation P, on the other hand, provides a single standard for *notices* regarding an institution's privacy policy regardless of the nature of the underlying transaction. Consumers engage in a variety of types of transactions that are subject to the Consumer Protection Regulations, which may include multiple subtransactions to effectuate the overall transaction. As a result, more than one disclosure may be required in connection with the overall transaction under the Consumer Protection Regulations. For example, a transaction under the Consumer Protection Regulations may involve an advertisement, an application, related application documents, estimates, initial disclosures, periodic statements, contracts, mortgages and closing statements. State laws may also call for additional disclosures in connection with a

[5] 12 C.F.R. 216.3(b)(1).

transaction. Unlike the privacy notice required under Regulation P, which does not depend upon the nature of the underlying transaction and therefore need not vary from transaction to transaction, disclosures under the Consumer Protection regulations are crafted to address the immediate transaction at hand. By requiring that certain transaction-specific information be disclosed to consumers, the nature of the disclosures required by the Consumer Protection Regulations are a function of the terms and conditions of the transaction itself. Accordingly, we believe the Board's goal of consistency is unlikely to be achieved by adopting the standard set forth in Regulation P

THE BOARD'S PROPOSAL CONFLICTS WITH AT LEAST TWO OTHER ON-GOING RULEMAKINGS

The Board's proposal to utilize the Regulation P standard conflicts with the recently announced Interagency Proposal to Consider Alternative Forms of Privacy Notices Under the Gramm-Leach-Bliley Act (the "Interagency Proposal")[6] and the agencies' Request for Burden Reduction Recommendations; Consumer Protection; Lending-Related Rules; Economic Growth and Regulatory Paperwork Reduction Act of 1996 Review (the "Agencies' Regulatory Review").[7]

In the Interagency Proposal, the agencies requested public comment on possible improvements to the privacy notices financial institutions must provide to consumers under the Gramm-Leach-Bliley Act. The agencies' notice states that the privacy rules do not prescribe any specific format or standardized wording for the privacy notices that financial institutions must send to consumers. Instead, financial institutions may design their own notices based upon their individual practices so long as they are consistent with law and meet the "clear and conspicuous" standard in the rule.[8] In recognition of the complexity involved in developing meaningful and readily understandable privacy notices, the agencies are now requesting public comment on possible language, formats, references and other key aspects of privacy notices.[9] Given possible changes to what may satisfy the "clear and conspicuous" standard that may result from this rulemaking, we believe Board action on its proposed rule would be premature.

Board action at this time could have one of two effects – both of which are undesirable. The first effect could be that the agencies determine that the issue of what constitutes "clear and conspicuous" is "off the table" because the Board has already acted to apply the current standard to the Consumer Protection Regulations. This would suggest that the issue of what satisfies the "clear and conspicuous" standard had been prejudged, which would be unfortunate and inconsistent with a fair and impartial administrative process. The second effect could be that the agencies determine to alter

[6] 68 *Fed. Reg.* 75,164 (December 30, 2003).
[7] 69 *Fed. Reg.* 2852 (January 21, 2004).
[8] 68 *Fed. Reg.* at 75,166.
[9] 68 *Fed. Reg.* at 75,166-7.

the "clear and conspicuous" standard, in which case the Board would find it necessary to modify the Consumer Protection Regulations to reflect the change to Regulation P. This would likely result in considerable additional expense for the financial industry because of the need to yet again change disclosures and forms required under the Consumer Protection Regulations. Accordingly, the pending rulemakings provide added weight to the need for the Board to withdraw the proposed rules.

THE PROPOSED DISCLOSURE FORMATS WILL NOT ACHIEVE THE BOARD'S GOALS

The proposed rules contain examples of what constitutes "clear and conspicuous" disclosure. The examples would not assist consumers and would make it more difficult for disclosures to meet the requirements of both state and federal law. For instance, the examples in the proposed rules of disclosures that are "designed to call attention" to the disclosure include using 12-point typefaces, wide margins and ample line spacing, and boldface or italics for key words. In documents that combine disclosures with other information, the proposed rules call for financial institutions to use distinctive type size, style, and graphic devices to call attention to the disclosures. Obvious, practical difficulties exist with these suggested formats. Consumers are likely to be confused as to why certain items are emphasized, particularly when the disclosures are combined with transaction-specific terms. The overall length of disclosures will be longer, as these formats require more page space, which will also increase the cost to the financial institution, and ultimately, to its customers. Indeed, there is little evidence to suggest that disclosures made in large type sizes are more readily understood by consumers.

The requirements under Regulations E, DD, and Z provide that the various disclosures required must be "noticeable." These disclosures are most useful to the consumer when they are presented in a readable form integrated with applicable contract terms. Consumers may want to know the contract terms just as much, if not more so, than the nature or significance of the information. Indeed, it would be difficult to make the Regulation Z disclosures comport with some state law requirements by following the "designed to call attention" examples listed in the proposed rules. California requires the California disclosures, Regulation Z disclosures, sales contract and all contract terms be contained in one document.[10] Under the proposed rules, however, Regulation Z disclosures may have to be disclosed more prominently than California disclosures to be considered "clear and conspicuous." The resulting document would be lengthy, for under California law, all text has to be contained on one piece of paper. One questions whether such a document would provide meaningful disclosures to consumers.

Moreover, the proposed rules also state that although adding contract terms, explanations, state disclosures and the like are not prohibited by the clear and conspicuous standard, the presence of this additional information may be a factor in

[10] California Retail Installment Sales Act, Cal. Civ. Code §1803.2-.3.

determining whether the standard is met.[11] As a result, it may very well be impossible to comply with the Board's rules and certain state laws that require that all information be contained in one document.

The proposed examples indicate that use of a plain-language heading and use of boldface or italics for key words are examples of disclosures that are designed to call attention to the nature and significance of the information.[12] The examples do not clarify if retaining headings or bolding key words that are not disclosures, but are material terms that a consumer is likely to want to know (*e.g.*, conditions of minimum payments on credit cards), would weigh against calling attention to the disclosure and therefore call into question whether the notice satisfies the clear and conspicuous standard.

We believe the examples of what constitutes "designed to call attention to the nature and significance of the information" do not necessarily make it easier for consumers to understand the disclosures. The examples will inevitably result in conflicts between state and federal disclosure requirements and make compliance with the Consumer Protection Regulations more difficult for financial institutions rather than aid in meeting the Board's goals of more meaningful disclosures.

THE "DESIGNED TO CALL ATTENTION TO THE NATURE AND SIGNIFICANCE" REQUIREMENT IS VAGUE AND UNNECESSARY.

The definition of clear and conspicuous in the proposed rules would add the requirement that a disclosure be "designed to call attention to the nature and significance of the information in the disclosure." The "designed to call attention to the nature and significance" phrase, however, injects new elements into the standards that now apply to disclosures under the Consumer Protection Regulations. Unfortunately, the standard is too vague for financial institutions to apply in the context of the Consumer Protection Regulations.

Financial institutions will be required to re-examine each disclosure document under the Consumer Protection Regulations and redraft them to attempt to meet this standard without meaningful guidance as to what will satisfy this aspect of the definition. The examples presented in the Board's proposal do not specify what satisfies the nature and significance requirements. Which examples go to the "nature" of the information and which go to "significance"? Information that is considered "significant" depends on the Consumer Protection Regulation involved. The examples and standards of Regulation P, which applies only to one type of standardized *notice*, are not sufficient to address all *disclosures* under the Consumer Protection Regulations. For example, Regulation Z requires that certain finance charges and annual percentage rates ("APR") be more conspicuous than other required disclosures.[13] Which examples should an

[11] *See, e.g.*, 68 *Fed. Reg.* at 68789.
[12] *See, e.g.*, 68 *Fed. Reg.* at 68791.
[13] 12 C.F.R. § 226.5a(a)(2).

institution follow to draw attention to the nature of finance charges and APR and which should an institution follow to draw attention to the significance of those disclosures? Additionally, the Schumer box under Regulation Z requires that long-term interest rates be in 18-point type and other disclosures be in 12-point type. Suggesting that disclosures other than those in the Schumer box be in 12-point type would appear to diminish the impact of the Schumer box. Accordingly, because of the vagueness attendant to the proposed rules, they should be withdrawn.

THE COSTS IMPOSED ON FINANCIAL INSTITUTIONS OUTWEIGH PURPORTED BENEFITS

To ensure that all disclosures under the Consumer Protection Regulations satisfy the clear and conspicuous standard, financial institutions will have to embark on a massive review of virtually all of their disclosures to consumers. The manpower and technological resources for such a review would impose enormous costs on all financial institutions and their customers. The typical financial institution has dozens if not hundreds of forms, depending upon its product offerings. The task of reviewing each and every form will consume considerable resources at each financial institution. Moreover, even after a comprehensive review, there is no assurance that an institution will have met the vague and ambiguous "clear and conspicuous" standard. The Consumer Protection Regulations provide model disclosures which, if followed, provide assurance that a financial institution is compliant with the obligation to provide clear and conspicuous notice to consumers. These model notices are specifically tailored to each Consumer Protection Regulation and the transactions each regulates, thus promoting consistency and benefiting consumers. The lack of specificity and safe harbor language in the proposed rules, in contrast, leaves financial institutions open to potential liability because the Consumer Protection Regulations generally contain provisions regarding private rights of action.

CONCLUSION

Based upon the above considerations, we believe that the Board should not adopt the proposed rules.

Sincerely,

Gilbert T. Schwartz

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